

INTERPRETING INSURANCE POLICIES: RULES OF CONSTRUCTION

August 17, 2015

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ANATOMY OF AN INSURANCE POLICY

- **Declarations Page**
- **Insuring Agreement**
- **Definitions**
- **Conditions**
- **Exclusions**
- **Endorsements**

DECLARATIONS PAGE

LEXINGTON INSURANCE COMPANY

Administrative Offices: 100 Summer Street, Boston, Massachusetts 02110-2103
(hereinafter called the Company)

COMMERCIAL GENERAL LIABILITY POLICY OCCURRENCE FORM

Declarations

Policy Number: [REDACTED]

Renewal of: **NEW**

Item 1. Named Insured: [REDACTED], INC.

Address: [REDACTED]

The Named Insured is:

- ☐ Individual ☐ Partnership ☐ Joint Venture ☐ Limited Liability Company
☒ Organization (other than a Partnership or Joint Venture) ☐ Trust

The Business of the Named Insured is:

FACILITY SERVICES FOR MOTOR VEHICLE TRANSPORTATION

Item 2. Policy Period: From: 12/31/2008 To: 12/31/2009
12:01 A.M., standard time at the address of the Named Insured as stated herein.

Item 3. Limits of Insurance:

Each Occurrence Limit	\$ 1,000,000	
Damage to Premises Rented to you Limit	\$ 100,000	- Any one premises
Personal & Advertising Injury Limit	\$ 1,000,000	- Any one person or organization
General Aggregate Limit	\$ 2,000,000	
Products-Completed Operations Aggregate Limit	\$ 2,000,000	

Item 4. Premium:

A. Total Advance Premium:	\$ 45,000
B. Annual Minimum Premium:	\$ 45,000
C. Minimum Earned Premium at Inception:	\$ 15,750

Item 5. Audit Period: Annual

The policy is comprised of this Declarations page, the policy form and the schedules and endorsements, if any, attached at inception or during the Policy Period.

INSURING AGREEMENT

COMMERCIAL GENERAL LIABILITY
CG 00 01 12 04

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V – Definitions.

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

b. This insurance applies to "bodily injury" and "property damage" only if:

- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
- (2) The "bodily injury" or "property damage" occurs during the policy period; and
- (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

- (1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;
- (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or
- (3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

DEFINITIONS

6. Representations

By accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;
- b. Those statements are based upon representations you made to us; and
- c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V – DEFINITIONS

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

- a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
- b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

2. "Auto" means:

- a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or

- b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

4. "Coverage territory" means:

- a. The United States of America (including its territories and possessions), Puerto Rico and Canada;

- b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in a. above; or

- c. All other parts of the world if the injury or damage arises out of:

- (1) Goods or products made or sold by you in the territory described in a. above;

- (2) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; or

- (3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication

provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in a. above or in a settlement we agree to.

5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.

7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.

8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

- a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

- b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

- a. The repair, replacement, adjustment or removal of "your product" or "your work"; or

CONDITIONS

2. The General Aggregate Limit is the most we will pay for the sum of:
 - a. Medical expenses under Coverage C;
 - b. Damages under Coverage A, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and
 - c. Damages under Coverage B.
3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".
4. Subject to 2. above, the Personal and Advertising Injury Limit is the most we will pay under Coverage B for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.
5. Subject to 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
 - a. Damages under Coverage A; and
 - b. Medical expenses under Coverage C because of all "bodily injury" and "property damage" arising out of any one "occurrence".
6. Subject to 5. above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage A for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.
7. Subject to 5. above, the Medical Expense Limit is the most we will pay under Coverage C for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

- a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:

- (1) How, when and where the "occurrence" or offense took place;
- (2) The names and addresses of any injured persons and witnesses; and
- (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

- b. If a claim is made or "suit" is brought against any insured, you must:

- (1) Immediately record the specifics of the claim or "suit" and the date received; and
- (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

- c. You and any other involved insured must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
- (2) Authorize us to obtain records and other information;
- (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
- (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

- d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

EXCLUSIONS

- e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
 - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
 - (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

"Bodily injury" to:

- (1) An "employee" of the insured arising out of and in the course of:
 - (a) Employment by the insured; or
 - (b) Performing duties related to the conduct of the insured's business; or
- (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

ENDORSEMENTS

COMMERCIAL GENERAL LIABILITY
CG 21 49 09 99

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

TOTAL POLLUTION EXCLUSION ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion f. under Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability is replaced by the following:

This insurance does not apply to:

f. Pollution

- (1) "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

- (2) Any loss, cost or expense arising out of any:

- (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants"; or
- (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

GENERAL RULES OF CONTRACT INTERPRETATION

- Read as a Whole
- Plain Meaning
- Defer to Definitions
- Consider the Context
- *Ejusdem Generis*
- Expression of One Thing is to the Exclusion of Another
- *Contra Proferentem*

THEORIES OF INSURANCE POLICY INTERPRETATION

Corbin	Williston
Reasonable Expectations	Strict Constructionist
Contextual	Plain Meaning
“Interpretation”	“Construction”
“Liberal”	“Conservative”

RESOLVING AMBIGUOUS POLICY LANGUAGE

- What is Ambiguity?
- Use of Extrinsic Evidence
- *Contra Proferentem*
- Reasonable Expectations

USE OF EXTRINSIC EVIDENCE: DUTY TO DEFEND

- **“Four Corners” (“Eight Corners”) Rule**
- **Alleged Facts v. “True” Facts**
- **Who Can Use “True” Facts?**

WILLISTON APPROACH

- **Strict Four Corners: Wisconsin**

Fernandez v. Strand, 63 F. Supp.2d 949
(E.D. Wis. 1999)

- **Four Corners With Exceptions: Florida**

Victoria Select Ins. Co. v. Vrchota Corp.,
805 F. Supp.2d 1337 (S.D. Fla. 2011)

CORBIN APPROACH

- **All Extrinsic Evidence Allowed: California**
Montrose Chem. Corp. v. Superior Court,
861 P.2d 1153 (Cal. 1993)
- **Only Policyholder's Extrinsic Evidence Allowed: New York**
Fitzpatrick v. American Honda Motor Co., Inc.,
78 N.Y.2d 61 (N.Y. 1991)

CONTRA PROFERENTEM

- **Rule of Last Resort?**
- **Sophisticated Policyholders**
- **Policyholder-Drafted Language**

DOCTRINE OF REASONABLE EXPECTATIONS

“The objectively reasonable expectations of applicants and intended beneficiaries of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.”

Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970)

REASONABLE EXPECTATIONS SPLIT OF AUTHORITY

- **Corbin Camp:** Alaska, Hawaii, Iowa, Massachusetts, Missouri, New Jersey, New York, North Carolina, Pennsylvania, Tennessee, U.S. Virgin Islands
- **Williston Camp:** Florida, Idaho, Illinois, Michigan, North Dakota, Ohio, South Carolina, South Dakota, Vermont, Washington
- **“Ambiguity” Camp:** Everywhere else

KEY FLORIDA CASELAW

- *Deni Associates of Florida, Inc. v. State Farm Fire & Casualty Ins. Co.*, 711 So.2d 1135 (Fla. 1998): ambiguity rule
- *Taurus Holdings, Inc. v U.S. Fid. & Guar. Co.*, 913 So.2d 528 (Fla. 2005): plain meaning rule
- *Wash. Nat'l Ins. Corp. v. Ruderman*, 117 So.3d 943 (Fla. 2013): contra proferentem

USE OF DEFINITIONS

- *Barcelona Hotel, LLC v. Nova Cas. Co.*, 57 So.3d 228 (Fla. 3d DCA 2011)
- *Rodrigo v. State Farm Fla. Ins. Co.*, 144 So.3d 690 (Fla. 4TH DCA 2014)

ILLUSORY COVERAGE

- *Purrelli v. State Farm & Cas. Co.*, 698 So.2d 618 (Fla. 2d DCA 1997)
- *Colony Ins. Co. v. Total Contracting & Roofing, Inc.*, 2011 WL 4962351 (S.D. Fla. Oct. 18, 2011)
- *Certain Underwriters at Lloyds v. Waveblast Watersports, Inc.*, 2015 U.S. Dist. LEXIS 4267 (S.D. Fla. Jan. 14, 2015)

CASE STUDY: CHINESE DRYWALL & THE POLLUTION EXCLUSION

- *General Fidelity Ins. Co. v. Foster*, 808 F. Supp.2d 1315 (S.D. Fla. 2011)
- *Auto-Owners Ins. Co. v. American Bldg. Materials, Inc.*, 820 F.Supp.2d 1265 (M.D. Fla. 2011) (“ABM I”)
- *Granite State Ins. Co. v. American Bldg. Materials, Inc.*, Case No. 8:10-cv-1542-T-24 EAJ (M.D. Fla. Jan. 24, 2012), *aff’d*, No. 12-10979 (11th Cir. Jan. 3, 2013) (unpublished) (“ABM II”)

PRACTICE TIPS

- **Forum Shopping**
- **Know Your Judge**
- **Getting to a Jury**
- **Know Where You Stand**